

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

FRIEDA AARON, <i>et al.</i> ,	:	CASE NO. 1:13-CV-202
	:	
Plaintiffs,	:	JUDGE TIMOTHY S. BLACK
	:	
vs.	:	<b>PLAINTIFFS' MOTION TO STRIKE</b>
	:	<b>DEFENDANTS ABUBAKAR ATIQ</b>
Defendants.	:	<b>DURRANI'S, M.D. AND THE CENTER</b>
	:	<b>FOR ADVANCED SPINE</b>
ABUBAKAR ATIQ DURRANI, MD <i>et al.</i> ,	:	<b>TECHNOLOGIES, INC.'S MOTION</b>
	:	<b>TO DISMISS</b>

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Comes now, Plaintiffs, and hereby moves the Court to Strike Defendants Abubakar Atiq Durrani's, M.D. (Durrani) and Center for Advanced Spine Technologies, Inc.'s (CAST) Motion to Dismiss Plaintiffs' Complaint. Because Defendants' motion is untimely, the Court should strike Defendant's motion. A Memorandum in support and proposed Order granting Plaintiffs' Motion is attached hereto.

Respectfully Submitted,

/s/ Eric C. Deters  
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## **MEMORANDUM IN SUPPORT**

### **I. Introduction**

The motion filed by Defendants is untimely and warrants the Court to strike their motion. “A motion under Rule 12(b)(6) raising the defense of failure to state a claim upon which relief may be granted must be made before the service of a responsive pleading.” Wright & Miller, *Federal Practice & Procedure: Civil 2d* § 1357, at 299-300 (1990). Defendants filed their Answer to the First Amended Complaint as Document 88, on December 2<sup>nd</sup>. Later on December 2<sup>nd</sup>, Defendant filed their Motion to Dismiss the Complaint as Document 89.

A 12(b)(6) motion to dismiss a complaint is an alternative to answering a plea for relief. *Baker v. Ohio Dept. of Rehab. & Corr.*, 144 Ohio App.3d 740, 754, 2001-Ohio-2553, 761 N.E.2d 667. As such, after an answer to the complaint is filed, the Defendant may no longer file a 12(b)(6) motion to dismiss the complaint, but may instead file a 12(c) motion for judgment on the pleadings.

### **II. Conclusion**

For the aforementioned reasons, Plaintiffs' move this Court to strike Defendants' motion to dismiss.

Respectfully Submitted,

/s/ Eric C. Deters

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Eric C. Deters, Esq

**CERTIFICATE OF SERVICE**

The foregoing document was filed electronically this 15th day of January 2014. Notice of filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Eric C. Deters  
Eric C. Deters